

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant,

Supreme Court No. 150677

v

Court of Appeals No. 321045

BRANDON MICHAEL HALL

Ottawa County Circuit Court
No. 13-037857-AR

Defendant-Appellee.

PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF

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Dated: July 2, 2015

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STATEMENT OF QUESTIONS PRESENTED

1. Do MCL 168.937 and MCL 168.544c conflict such that the defendant's conduct may only be charged under the latter statute?

Plaintiff-Appellant's answer: No

Defendant-Appellee's answer: Yes

2. Is the "rule of lenity" relevant in this case?

Plaintiff-Appellant's answer: No

Defendant-Appellee's answer: Yes

3. Would charging the defendant with felony forgery under MCL 168.937 violate his due-process rights?

Plaintiff-Appellant's answer: No

Defendant-Appellee's answer: Yes

STATUTES INVOLVED

A determination of the issues presented herein requires an interpretation of two separate statutory provisions within the Michigan Election Law and of the relationship between these separate provisions.

168.937 Forgery; penalty.

Sec. 937.

Any person found guilty of forgery under the provisions of this act shall, unless herein otherwise provided, be punished by a fine not exceeding \$1,000.00, or by imprisonment in the state prison for a term not exceeding 5 years, or by both such fine and imprisonment in the discretion of the court.

168.544c Nominating petition; type size; form; contents; circulation and signing; unlawful signature; false statement; misdemeanor; sanctions; applicability of section.

Sec. 544c.

(1) A nominating petition shall be 8-1/2 inches by 14 inches in size. On a nominating petition, the words "nominating petition" shall be printed in 24-point boldface type. "We, the undersigned," et cetera shall be printed in 8-point type. "Warning" and language in the warning shall be printed in 12-point boldface type. The balance of the petition shall be printed in 8-point type. The name, address, and party affiliation of the candidate and the office for which petitions are signed shall be printed in type not larger than 24-point. The petition shall be in the following form:

NOMINATING PETITION

(PARTISAN)

We, the undersigned, registered and qualified voters

of the city or township of , in the county

(strike 1)

of and state of Michigan, nominate,

..... ,

(Name of Candidate)

..... ,

(Street Address or Rural Route) (City or Township)

as a candidate of the party for the

office of ,

..... ,

(District, if any)

to be voted for at the primary election to be held on

the day of , 20

WARNING

A person who knowingly signs more petitions for the same office than there are persons to be elected to the office or signs a name other than his or her own is violating the provisions of the Michigan election law.

Printed Street Address

Name and or Date of Signing

Signature Rural Route Zip Code Mo. Day Year

1. _____

2. _____

3. _____

4. _____

numbered lines as above

CERTIFICATE OF CIRCULATOR

The undersigned circulator of the above petition asserts that he or she is qualified to circulate this petition and that each signature on the petition was signed in his or her presence; and that, to his or her best knowledge and belief, each signature is the genuine signature of the person purporting to sign the petition, the person signing the petition was at the time of signing a qualified registered elector of the city or township listed in the heading of the petition, and the elector was qualified to sign the petition.

Circulator—Do not sign or date certificate until after circulating petition.

(Printed Name and Signature of Circulator) (Date)

(City or Township Where Registered)

[or, for petitions under section 482,

“(City or Township Where Qualified to be
Registered)”]

(Complete Residence Address (Street and Number
or Rural Route)

(Zip Code)

Warning—A circulator knowingly making a false statement in the above certificate, a person not a circulator who signs as a circulator, or a person who signs a name other than his or her own as circulator is guilty of a misdemeanor.

(2) The petition shall be in a form providing a space for the circulator and each elector who signs the petition to print his or her name. The secretary of state shall prescribe the location of the space for the printed name. The failure of the circulator

or an elector who signs the petition to print his or her name, to print his or her name in the location prescribed by the secretary of state, or to enter a zip code or his or her correct zip code does not affect the validity of the signature of the circulator or the elector who signs the petition. A printed name located in the space prescribed for printed names does not constitute the signature of the circulator or elector.

(3) At the time of circulation, the circulator of a petition shall be a registered elector of this state. At the time of executing the certificate of circulator, the circulator shall be registered in the city or township indicated in the certificate of circulator on the petition. However, the circulator of a petition under section 482 need only be qualified to be a registered elector of this state at the time of circulation and at the time of executing the certificate of circulator.

(4) The circulator of a petition shall sign and date the certificate of circulator before the petition is filed. A circulator shall not obtain electors' signatures after the circulator has signed and dated the certificate of circulator. A filing official shall not count electors' signatures that were obtained after the date the circulator signed the certificate or that are contained in a petition that the circulator did not sign and date.

(5) Except as provided in section 544d, a petition sheet shall not be circulated in more than 1 city or township and each signer of a petition sheet shall be a registered elector of the city or township indicated in the heading of the petition sheet. The invalidity of 1 or more signatures on a petition does not affect the validity of the remainder of the signatures on the petition.

(6) An individual shall not sign more nominating petitions for the same office than there are persons to be elected to the office. An individual who violates this subsection is guilty of a misdemeanor.

(7) An individual shall not do any of the following:

(a) **Sign a petition with a name other than his or her own.**

(b) Make a false statement in a certificate on a petition.

(c) **If not a circulator, sign a petition as a circulator.**

(d) Sign a name as circulator other than his or her own.

(8) An individual who violates subsection (7) is guilty of a misdemeanor punishable by a fine of not more than \$500.00 or imprisonment for not more than 93 days, or both.

(9) If after a canvass and a hearing on a petition under section 476 or 552 the board of state canvassers determines that an individual has knowingly and intentionally

failed to comply with subsection (7), the board of state canvassers may impose 1 or more of the following sanctions:

(a) Disqualify obviously fraudulent signatures on a petition form on which the violation of subsection (7) occurred, without checking the signatures against local registration records.

(b) Disqualify from the ballot a candidate who committed, aided or abetted, or knowingly allowed the violation of subsection (7) on a petition to nominate that candidate.

(10) If an individual violates subsection (7) and the affected petition sheet is filed, each of the following who knew of the violation of subsection (7) before the filing of the affected petition sheet and who failed to report the violation to the secretary of state, the filing official, if different, the attorney general, a law enforcement officer, or the county prosecuting attorney is guilty of a misdemeanor, punishable by a fine of not more than \$500.00 or imprisonment for not more than 1 year, or both:

(a) The circulator of the petition, if different than the individual who violated subsection (7).

(b) If the petition is a nominating petition, the candidate whose nomination is sought.

(c) If the petition is a petition for a ballot question or recall, the organization or other person sponsoring the petition drive.

(11) If after a canvass and a hearing on a petition under section 476 or 552 the board of state canvassers determines that an individual has violated subsection (10), the board of state canvassers may impose 1 or more of the following sanctions:

(a) Impose on the organization or other person sponsoring the petition drive an administrative fine of not more than \$5,000.00.

(b) Charge the organization or other person sponsoring the petition drive for the costs of canvassing a petition form on which a violation of subsection (7) occurred.

(c) Disqualify an organization or other person described in subdivision (a) from collecting signatures on a petition for a period of not more than 4 years.

(d) Disqualify obviously fraudulent signatures on a petition form on which a violation of subsection (7) occurred without checking the signatures against local registration records.

(e) Disqualify from the ballot a candidate who committed, aided or abetted, or knowingly allowed a violation of subsection (7) on a petition to nominate that candidate.

(12) If an individual refuses to comply with a subpoena of the board of state canvassers in an investigation of an alleged violation of subsection (7) or (10), the board may hold the canvass of the petitions in abeyance until the individual complies.

(13) A person who aids or abets another in an act that is prohibited by this section is guilty of that act.

(14) The provisions of this section except as otherwise expressly provided apply to all petitions circulated under authority of the election law. (emphasis added)

STATEMENT OF JUDGMENT APPEALED FROM AND RELIEF SOUGHT

On December 18, 2015, the People of the State of Michigan applied to the Michigan Supreme Court for leave to appeal the per curiam judgement entered by the Michigan Court of Appeals on October 23, 2014. On May 22, 2015, the Court entered an order indicating that the application for leave to appeal was considered. The Clerk was directed to schedule oral argument on whether to grant the application or take other action. The parties were instructed to submit supplemental briefs within 42 days of the order.

This supplemental brief addresses three specific questions: (1) whether MCL 168.937 and MCL 168.544c conflict such that the defendant's conduct may be charged only under the latter statute; (2) whether the "rule of lenity" is relevant in this case; and (3) whether charging the defendant with felony forgery under MCL 168.937 would violate his due-process rights.

STATEMENT OF FACTS

The important facts of the underlying case are not in dispute, and they are set out in detail in the application for leave to appeal filed on December 18, 2014. By way of brief reminder, Hall admits that he knowingly signed other people's names to numerous nominating petitions, using different colored pens and signing with both his right and his left hands to make the signatures appear different. He was charged with ten counts of election law forgery under MCL 168.937.

STANDARD OF REVIEW

Whether conduct falls within the scope of a penal statute is a question of statutory interpretation. An appellate court reviews questions of statutory interpretation *de novo*. When reviewing a district court's bind-over decision, the appellate court reviews the examining magistrate's determination regarding the sufficiency of the evidence for an abuse of discretion, but the magistrate's rulings concerning questions of law are reviewed *de novo*. *People v Flick*, 487 Mich 1 (2010). This standard of review applies to all three arguments.

ARGUMENT

- I. **MCL 168.937 does not conflict with MCL 168.544c; instead it provides more severe punishment, based on proof of an additional element, for a more severe type of forgery.**

The two separate statutory provisions are not in conflict. To the contrary, they involve separate and distinct crimes, with different elements. Just like unarmed robbery (MCL 750.530) and armed robbery (MCL 750.529), they involve different conduct. Michigan statutes concerning robbery address the forceful taking of property from a person. But unarmed robbery becomes armed robbery, a different, more serious crime, by proof of an additional element—that a weapon was used in the taking. Likewise, both MCL 168.544C and MCL 168.937 concern the making of a false document. But when the false document is made with the additional element of an intent to defraud, the conduct becomes a more serious offense.

It is a fundamental rule of statutory construction that when two statutes encompass the same subject matter, one being general and one specific, the latter will control. But this rule is not applicable whenever the two statutes do not in fact cover the same subject matter. *People v Ford*, 417 Mich 66, 79 (1982). The test as to whether the two statutes involve the same subject matter is whether they share the very same elements. *Id.* at 79–80.

In *People v Waterstone*, 296 Mich App 121 (2012), the Court of Appeals recognized that the critical question in determining whether two separate crimes involve the same conduct is whether they share the same elements. In addressing whether a misdemeanor statute governing willful neglect of duty by a public officer (MCL 750.475) precluded prosecution under a felony statute punishing common-law crimes not prescribed by statute (MCL 750.505), the Court focused on whether the two offenses had the same elements: “It is proper to dismiss a charge brought under MCL 750.505 if the charge ‘sets forth all the elements of [a] statutory offense’” 296 Mich App at 133–134, quoting *People v Thomas*, 438 Mich 448 (1991) (some quotation marks omitted). In *Waterstone*, because the two charged crimes had the same elements, MCL 750.505 could not be invoked in addition to the MCL 750.475. 296 Mich App at 144.

Here, in contrast, the two crimes do not have the same elements. MCL 168.544c provides that it is a misdemeanor to sign another person’s name to a nominating petition. The motive under which a person acts is not an element of the offense. The only elements of the crime are that the defendant signs a name other

than his or her name to the petition, and that he or she intended to do so. But by enacting MCL 168.937 the Legislature has determined that it is a five-year felony to commit the offense of election law forgery. Forgery is defined at common law as the making of a false document with the intent to defraud. *People v Van Alstine*, 57 Mich 69, 73 (1885). Forgery includes any act that fraudulently makes an instrument purport to be what it is not. *People v Susalla*, 392 Mich 387, 390 (1974). Thus this offense requires not only proof of the making of a false document, but also proof that the making was done with a specific intent to defraud.

It is this separate element requiring the intent to defraud that sets the two crimes apart. Just as unarmed robbery and armed robbery both involve the forceful taking of property, MCL 168.544c and MCL 168.937 both involve the making of a false document. But just as the use of a weapon changes the 15-year offense of unarmed robbery to the life offense of armed robbery, the intent to defraud changes the misdemeanor offense of MCL 169.544c to a felony offense of forgery under MCL 169.937.

There is no conflict between the two statutes.

II. The “rule of lenity” is not relevant in this case.

The rule of lenity is a rule of statutory construction for resolving textual ambiguity; it is not a rule of constitutional law. E.g., *Bifulco v United States*, 447 US 381, 387 (1980) (describing “ ‘the rule of lenity’ ” as a “principle of statutory construction”); *Tarrant v Ponte*, 751 F2d 459, 466 (CA 1, 1985) (“rejecting petitioner’s argument that the ‘rule of lenity’ has been transformed from a rule of

construction applicable to statutes . . . into a constitutional presumption”) (Breyer, J. on panel); *United States v Rivera*, 265 F3d 310, 312 (CA 5, 2001) (“The rule-of-lenity is a rule of statutory construction, rather than a separate constitutional framework for raising claims.”) (citations omitted); *Lurie v Wittner*, 228 F3d 113, 126 (CA 2, 2000) (“the rule of lenity is a canon of construction rather than a federal law”); *Gollehon v Mahoney*, 259 F App’x 1, 3 (CA 9, 2007) (“the rule of lenity is not in and of itself constitutional”).

Both the United States Supreme Court and this Court have recognized that the rule of lenity does not apply unless there is a genuine ambiguity in a criminal statute that cannot be resolved by consideration of the statutory language and legislative history. In *Callahan v United States*, 364 U.S. 587 (1961), the U.S. Supreme Court pointed out that the rule serves only as an aid for resolving an ambiguity and may not to be used to create one. *Id.* at 596. The rule of lenity, the Court continued, comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers. *Id.*; accord, e.g., *United States v Castleman*, 134 S Ct 1405, 1416 (2014) (“ ‘[T]he rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended.’ ”) (quoting *Barber v Thomas*, 560 US 474, 488 (2010)).

This Court has followed the same rule. E.g., *People v Wakeford*, 418 Mich 95, 113–14 (1983) (“The rule of lenity properly applies only in the circumstances of an

ambiguity, or in the absence of any firm indication of legislative intent.”); *People v Denio*, 454 Mich 691, 700 n 12 (1997) (same); *People v Gardner*, 482 Mich 41, 63, 753 NW2d 78, 92 (2008) (rejecting application of the rule of lenity because there was “nothing textually ambiguous about the Legislature’s directive”).

As a rule of construction, the rule of lenity is a rule of last resort because it does not aid in determining the Legislature’s intent but rather is merely a way to resolve a tie caused by statutory ambiguity. Cf. *Klapp v United Ins Grp Agency, Inc*, 468 Mich 459, 473–474 (2003) (explaining that the rule of construing a contract against its drafter is a rule of last resort because it does not help determine the parties’ intent); *Reno v Koray*, 515 US 50, 65 (1995) (“The rule of lenity applies only if, ‘after seizing everything from which aid can be derived,’ we can make ‘no more than a guess as to what Congress intended.’”) (citations omitted).

Here, there is no ambiguity in either of the separate statutory provisions. The crimes of “election law forgery” under MCL 168.937 and “signing someone else’s name to a nomination petition” under MCL 168.544c are plain on the text of the statute and easily understood. There is nothing ambiguous about the two statutory provisions: each indicates the specific conduct that is prohibited and the potential penalty.

Even when read together, they are still clear and unambiguous. They set out separate and distinct crimes, with separate and distinct penalties. These two crimes have different elements. The 93-day misdemeanor under MCL 168.544c requires only that a person places a false signature on a petition, while the five-year felony

proscribed by MCL 168.937 requires that the false document be made for the purpose of perpetrating a fraud. The crime under MCL 168.937 requires proof of an element that MCL 544c does not. Anytime a false name is signed to a nominating petition, no matter what the reason or purpose, the misdemeanor occurs. But when such an act is done with a fraudulent intent, the crime is aggravated to a felony.

III. Charging the defendant with forgery under MCL 168.937 would not violate his due-process rights.

It is a fundamental tenet of due process that no one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes. *Lanzetta v New Jersey*, 306 US 451, 453 (1939). A criminal statute is thus invalid as violating due process if the statute fails to give a person of ordinary intelligence fair notice that his or her contemplated conduct is forbidden. *United States v Harris*, 347 US 612, 617 (1954). So too, vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given statute. *United States v Evans*, 333 US 483 (1948). But when two separate statutes each separately and unambiguously specify the activity proscribed and the penalties available upon conviction, although the statutes create uncertainty as to which crime will be charged, the notice requirements of the Due Process Clause are satisfied. *United States v Batchelder*, 442 US 114, 123 (1979).

In *Batchelder*, the United States Supreme Court addressed a situation where two separate and distinct federal statutes addressed the very same conduct. Both crimes had the very same elements. The violation of one carried a possible sentence

of two years, while the other provided for a five-year sentence. The defendant was charged with, and convicted of, the offense carrying the five-year penalty. In rejecting the defendant's due-process argument, the Court stated:

The provisions in issue here, however, unambiguously specify the activity prescribed and the penalties available on conviction. That this particular conduct may violate both Titles does not detract from the notice afforded by each. Although the statutes create uncertainty as to which crime may be charged and therefore what penalties may be imposed, they do so to no greater extent than would a single statute authorizing various alternative punishments. So long as overlapping criminal provisions clearly define the conduct prohibited and the punishment authorized, the notice requirements of the Due Process Clause are satisfied. [*Batchelder*, 442 US at 123 (citation omitted).]

Here, MCL 168.544c unambiguously provides that a criminal offense occurs when one signs a name other than his or her name a petition, and that it is a 93-day misdemeanor to do so. But likewise, MCL 168.937 provides that a criminal offense occurs when one signs a name other than his or her name to a petition with the intent to defraud, and that it is a five year felony to do so. Each of the separate overlapping criminal provisions clearly define the conduct that is prohibited and the punishment authorized.

Batchelder controls, and due-process requirements are satisfied.

CONCLUSION AND RELIEF REQUESTED


For these reasons, the Court should grant Plaintiff-Appellant's application and permit the matter to proceed as a calendar case, or, in the alternative, summarily reverse the Court of Appeals and remand the case to the district court with instructions to bind Defendant over on the ten charged counts of election law forgery under MCL 168.937.

Respectfully submitted,

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Dated: July 2, 2015